

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 30 September 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

**Redacted version of Decision concerning 'Victims' application relating to
possible disclosure of confidential information'**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Adesola Adeboyejo

Counsel for the Defence

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives for Victims

Mr Fergal Gaynor

Unrepresented Victims

Legal Representatives for Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Article 68(1) of the Rome Statute ('Statute'), Regulation 24(5) of Regulations of the Court ('Regulations'), Article 8(4) of the Code of Professional Conduct for Counsel ('Code of Conduct')¹ and paragraph 20 of the Protocol concerning the handling of confidential information ('Protocol on Confidential Information'),² issues this 'Decision concerning "Victims' application relating to the possible disclosure of confidential information"'.

I. Procedural background and submissions

1. On 13 August 2013, the Common Legal Representative for Victims ('Legal Representative') filed an application informing the Chamber of a potential unauthorised disclosure of confidential information by the defence for Mr Kenyatta ('Defence') and requesting the Chamber to order the Defence to provide clarifying information in respect of such disclosure ('Application').³ The Legal Representative expressed concern that the information, which was disclosed in the context of legal proceedings initiated by the Defence in the High Court of Kenya [REDACTED], may lead to the identification of victims or protected witnesses in the present case.⁴ As such, he asserted, the disclosure may amount to a breach of the Chamber's Protocol on Confidential Information and of Article 8(4) of the Code of Professional Conduct for Counsel.⁵
2. On 14 August 2013, the Defence sent a letter to the Legal Representative, copying the Chamber, notifying him that the disclosed information in question did not

¹ Resolution ICC-ASP/4/Res.1, adopted by the Assembly of State Parties on 2 December 2005.

² Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with a witness whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469.

³ Victims' application relating to possible disclosure of confidential information, ICC-01/09-02/11-789.

⁴ ICC-01/09-02/11-789, paras 9 – 12.

⁵ ICC-01/09-02/11-789, paras 12 – 15.

relate to any victims participating in the case and suggesting that the Legal Representative withdraw the Application. By return letter, also dated 14 August 2013 and copied to the Chamber, the Legal Representative declined to withdraw the Application.

3. On 20 August 2013, the Defence filed its formal response to the Application, including six confidential *ex parte*, Defence and Office of the Prosecutor ('Prosecution') only, annexes ('Response').⁶ The Defence provided the Chamber with detailed information, and copies of relevant documents, relating to the confidential proceedings filed before the High Court of Kenya. It confirmed that its investigations [REDACTED]

[REDACTED]
[REDACTED].⁷

With respect to the Prosecution witnesses, the Defence submitted that the information was disclosed with the Prosecution's prior knowledge and consent and that it [REDACTED]

[REDACTED].⁸ The Defence rejected the allegation that the disclosure had infringed the Protocol on Confidential Information or the Code of Conduct.⁹ It requested that the relief sought by the Legal Representative be dismissed.¹⁰

4. On 23 August 2013, the Legal Representative requested leave to reply to the Response seeking to address four issues raised therein.¹¹

⁶ Defence response to the 'Victims' application relating to possible disclosure of confidential information', ICC-01/09-02/11-793-Conf with confidential *ex parte*, Prosecution only annexes A – F. A public redacted version of the Response was filed on 22 August 2013, ICC-01/09-02/11-793-Red.

⁷ ICC-01/09-02/11-793-Conf, paras 14 -15.

⁸ ICC-01/09-02/11-793-Conf, para.16.

⁹ ICC-01/09-02/11-793-Red, para. 14.

¹⁰ ICC-01/09-02/11-793-Red, para. 28.

¹¹ Victims' request for leave to reply to the "Defence response to the 'Victims' application relating to possible disclosure of confidential information", ICC-01/09-02/11-795-Conf.

5. On 28 August 2013, the Victims and Witnesses Unit ('VWU') filed observations in relation to the Application ('Observations').¹² The VWU [REDACTED]
[REDACTED]
[REDACTED]¹³ and [REDACTED]
[REDACTED]
[REDACTED].¹⁴ It requested that further details about the investigation be shared with it [REDACTED]
[REDACTED].¹⁵
6. On 13 September 2013, pursuant to a direction of the Chamber,¹⁶ the Prosecution filed a reply to the Observations ('Reply').¹⁷ The Prosecution submitted that it had already provided all necessary information [REDACTED]
[REDACTED] and re-iterated that, in its view, the investigation did not pose any potential security threat [REDACTED]
[REDACTED]
[REDACTED].¹⁸ It submitted that the disclosure of information was in full compliance with the terms of the Protocol on Confidential Information.¹⁹

¹² Victims and Witnesses Unit's observations in relation to the 'Victims application relating to possible disclosure of confidential information', ICC-01/09-02/11-798-Conf-Corr. The original filing was classified as confidential, ex parte, VWU only. On 30 August 2013, a corrigendum was filed and subsequently reclassified as confidential, available to the Prosecution and Defence, pursuant to an order of the Chamber dated 2 September 2013. A confidential redacted version was also filed.

¹³ ICC-01/09-02/11-798-Conf-Corr, para. 4.

¹⁴ ICC-01/09-02/11-798-Conf-Corr-Red, para. 6.

¹⁵ ICC-01/09-02/11-798-Conf-Corr-Red, para. 6.

¹⁶ Email from Trial Chamber V(B) Communications, 3 September 2013 at 18:22.

¹⁷ Prosecution's reply to the 'Victims and Witnesses Unit's observations in relation to the 'Victims application relating to possible disclosure of confidential information', ICC-01/09-02/11-804-Conf.

¹⁸ ICC-01/09-02/11-804-Conf, paras 8 – 9.

¹⁹ ICC-01/09-02/11-804-Conf, paras 14.

II. Analysis

A. Request for leave to reply

7. As a preliminary matter, the Chamber addresses the Legal Representative's request for leave to reply to the Response. Pursuant to Regulation 24(5) of the Regulations, a reply to a response may only be filed with the leave of the Chamber. The decision whether to grant leave is a discretionary one, based on the Chamber's assessment of whether further submissions would assist in its determination of the matter *sub judice* or otherwise be in the interests of justice.
8. In the present case, the Legal Representative seeks to address four issues. The first issue is the legal question of whether the [REDACTED]
[REDACTED]
[REDACTED]
violates Article 8(4) of the Code of Conduct and paragraph 20 of the Protocol on Confidential Information.²⁰ The Chamber does not consider it appropriate or necessary to entertain submissions from the Legal Representative on this issue, bearing in mind that no victims or dual status witnesses are affected by the disclosure in question and given that the Chamber has access to all relevant documents, [REDACTED], to enable it to determine the legal question.
9. The second and fourth issue relate to criticisms by the Defence of the Legal Representative's conduct in filing the Application rather than making further attempts to resolve the matter *inter partes*.²¹ The third issue relates to the Defence's failure to retract a statement attributed to it in the Kenyan media or to assess the "distress and anxiety" that such a statement may cause in the victim community.²²

²⁰ ICC-01/09-02/11-795-Conf, para. 4(a).

²¹ ICC-01/09-02/11-795-Conf, para. 4(b) and (d).

²² ICC-01/09-02/11-795-Conf, para. 4(c).

As none of these issues have a direct bearing on the matter that the Chamber is called to decide, the Chamber does not consider that it would not be assisted by receiving submissions thereon. To the extent that the Legal Representative wishes to address these matters for the purposes of completeness of the record, the Chamber considers that his position is adequately summarised in the leave request itself. Noting, however, that the leave to reply is so far available only as a confidential filing and in order to make the Legal Representative's position publicly known, the Chamber directs the Legal Representative to file a public redacted version of his request, with redactions to be applied consistently with the public redacted versions of the Response and this Decision.

B. Requests for further information

Legal Representative

10. The substantive relief requested by the Legal Representative in the Application is an order directing the Defence to, firstly, indicate whether it has 'communicated information which might lead to the identification of any victim of the crimes charged in the present case, or any protected witness, to any member of "the public", as defined in the Protocol [...]' and secondly, provide the record required by paragraph 22 of the Protocol on Confidential Information in relation to any such disclosure.²³
11. In its Response, the Defence provided detailed information and copies of relevant documents in relation to the disclosure. In the view of the Chamber, the information and documents voluntarily provided by the Defence sufficiently address the Legal Representative's request and, therefore, the request is rendered moot. Although the Defence did not provide a separate record, as such, of the disclosure in question, the information and documents provided as part of the

²³ ICC-01/09-02/11-789, para. 23.

Response include the details required by paragraph 22 of the Protocol on Confidential Information. Moreover, the Chamber notes that, in view of its finding below, paragraph 22 of the Protocol on Confidential Information, which relates to the disclosure of “identifying information”, would not apply in the present circumstances.

VWU

12. The VWU in its Observations requested further details concerning the [REDACTED]
[REDACTED]
[REDACTED]. It
requested the information in order to conduct a [REDACTED]
[REDACTED].²⁴

13. The Prosecution’s Reply, whilst maintaining that all relevant details had already been furnished to the VWU, explained [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. In these circumstances, the Chamber considers that the VWU’s request has been adequately addressed by the Reply and no further order of the Chamber is necessary. Should the VWU continue to have concerns as to the security of witnesses and require further information, the appropriate course would be to attempt to resolve the matter with the parties and, if that is unsuccessful, seize the Chamber of a fresh request detailing its particular concerns and specifying the particular information required.

C. Compliance with the Protocol and Code of Conduct

14. The Chamber is not seized of a formal request for a ruling on whether the [REDACTED] amounted to a breach of the Protocol on

²⁴ ICC-01/09-02/11-798-Conf-Corr-Red, para. 7.

Confidential Information or the Code of Conduct. The Application stated that the underlying purpose of the Legal Representative's request for information was to 'assist the Trial Chamber in determining whether, in fact, there has been a breach of the Protocol, or of the Code of Conduct'²⁵ and to enable the Chamber to 'take whatever action it deems appropriate.'²⁶ However, as noted above, the substantive relief requested in the Application was limited to an order directing the provision of further information.

15. Notwithstanding the above, given the Chamber's duty under Article 68(1) of the Statute to ensure the protection of witnesses and victims in the proceedings and in order to provide clarity to the parties and participants as to the Chamber's interpretation of the relevant provisions of the Protocol on Confidential Information and the Code of Conduct, the Chamber is prepared to consider *proprio motu* the propriety of the disclosure and whether it presented a risk to the security of witnesses.

16. Article 8(4) of the Code of Conduct prohibits Counsel from revealing, without leave of the Court, 'the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts'. Although the Code of Conduct does not in itself apply to Prosecution counsel,²⁷ the Chamber has previously determined that its provisions should 'where applicable and to the extent possible' be observed by Prosecution Counsel for the purposes of the conduct of the present case.²⁸

17. Paragraph 20 of the Protocol on Confidential Information provides:

²⁵ ICC-01/09-02/11-789, para.2.

²⁶ ICC-01/09-02/11-789, para.22.

²⁷ According to Article 1 of the Code of Conduct, it applies to 'defence counsel, counsel acting for States, amici curiae and counsel or legal representatives for victims and witnesses'.

²⁸ Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, para. 16. The Chamber notes that since this Decision was issued, the Prosecution has adopted its own Code of Conduct which entered into force on 5 September 2013.

Should it become necessary for the purposes of conducting investigations and/or preparation of the case to refer to the identity of any individual who is or has been involved, directly or indirectly, with the activities of the Court, the party or participant shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.²⁹

18. On the basis of the information and documents provided in the Defence's Response and the confirmation of that information by the Prosecution in its Reply, the Chamber is satisfied that [REDACTED] would not, in the ordinary course, lead to the identification of any protected witnesses. As such, the Chamber considers that the disclosures did not amount to a violation of Article 8(4) of the Code of Conduct or of paragraph 20 of the Protocol on Confidential Information.

19. Specifically, the Chamber is satisfied, based on its own review of the relevant documentation and the assurances of the Defence and the Prosecution, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

20. Moreover, reasonable steps were taken to limit [REDACTED]
[REDACTED]
[REDACTED]. Specifically, the legal proceedings in the High Court of Kenya were filed confidentially [REDACTED]
[REDACTED]
[REDACTED].

21. Finally, given that the [REDACTED]
[REDACTED], the Chamber is satisfied that the

²⁹ ICC-01/09-02/11-469-Anx

[REDACTED]

[REDACTED]

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

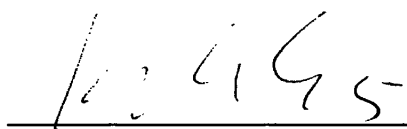
DISMISSES, as moot, the relief sought in the Application;

REJECTS the Legal Representative's request for leave to reply to the Defence Response;

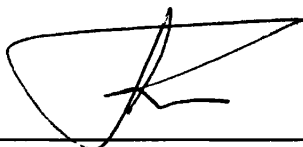
DISMISSES, as moot, the request for further information included in the Observations;

DETERMINES that the relevant investigative steps taken by the Defence in conjunction with the Prosecution did not violate Article 8(4) of the Code of Counsel or paragraph 20 of the Protocol on Confidential Information.

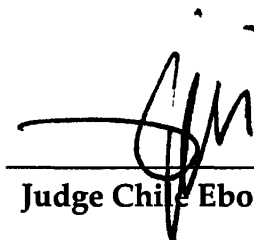
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 30 September 2013

At The Hague, The Netherlands